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NO.82-1734

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LINDA SIDOTI PALMORE,

PETITIONER,

v.

ANTHONY J. SIDOTI,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER

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QUESTION PRESENTED

WHETHER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT PROHIBIT A COURT FROM CONSIDERING OR FROM RELYING UPON A SUBSEQUENT INTERRACIAL MARRIAGE OF THE CUSTODIAL PARENT AS A GROUND FOR ORDERING A CHANGE OF CUSTODY.

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OPINION BELOW

The Circuit Court of the Thirteenth Judicial Circuit of the State of Florida

entered an Order on Modification of Final Judgment on March 1, 1982. [Pet.A. 23]*

The Petitioner timely appealed to the Florida District Court of Appeal, Second District, which affirmed the judgment of the Florida Circuit Court without issuing an opinion on December 8, 1982.[Pet.A.29]

JURISDICTION

The Order of Affirmance of the Florida District Court of Appeal, Second District was entered on December 8, 1982. Petitioner timely filed a Petition for Rehearing and a Motion to Stay the Mandate with the Second District Court of Appeal in order to permit her to file a Petition for

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*References are to the Appendix to the Petition for Certiorari, e.g., [Pet.A.__]; the Joint Appendix, e.g., [J.A.__]; and to the Record, e.g., [R.__].

Certiorari in this Court. On January 24, 1983 the Second District Court of Appeal denied the Petition for Rehearing and denied the Motion to Stay the Mandate. [Pet.A.30]

The Petition for Writ of Certiorari was filed on April 23, 1983. The Petition for Writ of Certiorari was granted on October 17, 1983.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.§1257(3). Because the Second District Court of Appeal elected not to write an opinion, the Supreme Court of Florida was without jurisdiction to review this case and the Second District Court of Appeal is the highest state court in which a decision could be rendered. Fla. Const. Art. V §3(b)(3); Florida Supreme Court Manual of Internal

Operating Procedures, II A1.(a) 396 So. 2d LXXXV; Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution reprinted in Appendix D to the Petition for Certiorari. [Pet.A. 31]

STATEMENT OF THE CASE

On May 29, 1980, the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida entered a Final Judgment dissolving the marriage of Petitioner to Respondent and awarding Petitioner custody of Melanie Lynn Sidoti, a child born June 24, 1977. The Circuit Court found that she was a "fit and proper person to have such custody."[J.A. 7]

On September 20, 1981, the Respondent filed a Petition to Modify the Final Judg-

ment in the Circuit Court and sought custody of the minor child. At the time the Petition for Modification of Final Judgment was filed the Petitioner was cohabitating with her fiance Clarence Palmore (now husband) whom she married on November 21, 1981. [J.A.14] [R.54,55,Resp. Ex.1] The Petitioner's household consisted of herself, her fiance (later husband), her seventeen year old son by a previous marriage and the minor child Melanie. [Pet.A. 25]

The Respondent's Petition for Modification alleged that the Petitioner "...certainly has not acted in the best interest and welfare of said minor child in that she has had a black man living with her for some period of time, and may even still be living with her..." and that this had

created a bad environment for the child. [J.A. 11-12] The Respondent also alleged that the child had an infestation of head lice on two occasions and wore clothing stained with mildew and that those conditions were indicative of some degree of neglect by the Petitioner.[J.A. 12]

Following a hearing, on March 1, 1982, the Circuit Court entered an Order on Modification of Final Judgment finding that both parties had remarried and that there was no issue as to either party's devotion to the child, the adequacy of housing facilities or respectability of the new spouse of either parent. [Pet.A.24] [R.12]

The Court found that the Petitioner had brought her fiance into her home and carried on a sexual relationship with him without being married to him and that "such

action tended to place gratification of her own desire ahead of her concern for the child's future welfare." [Pet.A. 26] The Circuit Court also noted that there was evidence that the Petitioner did have one other male friend at the home on an occasion. [Pet.A. 25]

The Circuit Court observed that:

> ...despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vunerable (sic) to peer pressures, suffer from the social stigmatization that is sure to come. [Pet.A. 26-27] [R. 14].

Accordingly, the Circuit Court entered an Order modifying the Final Judgment to award Respondent custody of the child, having found that there was substantial competent evidence of changed circumstances

and that the best interest of the child would be served by awarding custody of the minor child to the Respondent. [Pet.A. 27].

SUMMARY OF ARGUMENT

Sixteen months after the Petitioner was awarded custody of her daughter, the Respondent filed a Petition to Modify Final Judgment seeking custody of the child because, inter alia, Petitioner was cohabiting with a black man, Clarence Palmore, who at the time of the final hearing was her husband.

After a hearing the court found that although there was "...no issue as to either party's devotion to the child, the adequacy of housing facilities or respectibility (sic) of the new spouse of either parent," the child would suffer "social

stigmatization" as a result of the interracial marriage. The Petitioner's interracial marriage was the pivotal, determining, if not the sole factor in the court's decision to take the child from the Petitioner.

Not one scintilla of evidence was introduced to show that the child had been adversely affected by the interracial marriage.

In so ruling, the trial court violated the Petitioner's rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Her remarriage was considered by the trial court but the Respondent's remarriage was not considered because he married a white person. The Petitioner's remarriage was used as a basis for predicting "social stigmatization" of the child that would be "sure to come."

This Court's decision in Loving v. Virginia, 388 U.S. 1 (1967) stands for the proposition that a person has a fundamental right to marry a person of another race which cannot be infringed upon by the state. In this case the trial court disqualified the Petitioner from being a custodial parent because of her remarriage to a black man. The court's consideration of her subsequent interracial marriage was an impermissible racial classification which inhibited her freedom to marry a black man without an overriding state purpose to justify the classification.

ARGUMENT

A. Florida law requires a showing of adverse effect on a child prior to ordering a change of custody.

It is important at the outset to place this case in proper context. A trial

court does not have the same degree of discretion in modifying the custody provisions of a judgment of dissolution of marriage as it does in determining custody at the time of the original judgment. Robinson v. Robinson, 333 So.2d 526 (Fla. Dist. Ct. App. 1976). Before the court can change custody, the evidence must show that there has been a substantial change in the conditions of the parties and that the best welfare of the child will be promoted by the court's action. Culpepper v. Culpepper, 408 So.2d 782 (Fla. Dist. Ct. App. 1982).

In order to meet the burden of proving the substantial change of circumstances necessary to justify the modification of custody, the party seeking to modify custody must prove that the child has been

adversely affected by the change of circumstances. Culpepper, supra at 784.

Citing Dinkel v. Dinkel, 322 So.2d 22 (Fla. 1975) the Second District Court of Appeal has stated that "the moral unfitness of a party may be considered in a custody case so long as it has a direct bearing on the welfare of the child." Culpepper v. Culpepper, 408 So.2d 782, 784 (Fla. Dist. Ct. App 1982).

B. The right to marry is a fundamental right.

This Court has long recognized marriage as an important institution in American life. Maynard v. Hill, 125 U.S. 190 (1888). In 1978 the Court stated that the right to marry is fundamental. Zablocki v. Redhail, 434 U.S. 374 (1978). In Santosky v. Kramer, 102 S.Ct. 1388 (1982) this

Court stated that "freedom of choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." 102 S.Ct. at 1394.

In Stanley v. Illinois, 405 U.S. 645, 651 (1972) this Court stated as follows:

> The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and "[r]ights far more precious...than property rights," May v. Anderson, 345 U.S. 528, 533 (1953).... The integrity of the family unit has protection in the Due Process Clause of the Fourteenth Amendment... [and] the Equal Protection clause of the Fourteenth Amendment.... [405 U.S. at 651.]

Against this background, the question presented is whether the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit a court from considering

or from relying upon a subsequent interracial marriage of the custodial parent as a ground for ordering a change of custody.

C. The freedom to marry a person of another race is protected by the Fourteenth Amendment and cannot be infringed upon by the state.

This Court has repeatedly held that racial classifications are inherently suspect, justified by only the most compelling governmental interest. In McLaughlin v. Florida, 379 U.S. 184 (1964) this Court struck down on equal protection grounds a Florida Statute which made interracial cohabitation of unmarried persons punishable but did not proscribe cohabitation by unmarried persons of the same race. In Loving v. Virginia, 388 U.S. (1967) this Court struck down criminal anti-miscegena-

tion laws in Virginia. In doing so the Court used the following language:

> The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry or not to marry, a person of another race resides with the individual and cannot be infringed by the state. 388 U.S. at 12.

The reasoning behind the Loving case was that the statute in question constituted a restriction of the rights of citizens on account of race. The Court stated that any restriction of the freedom to marry solely because of racial classifications violated the central meaning of the Equal Protection Clause. 388 U.S. at 12.

The other basis of the decision was that the statutes in question deprived the

individuals of liberty without due process of law in violation of the Due Process clause of the Fourteenth Amendment. The Court noted that the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the "basic civil rights of man" fundamental to our very existence and survival. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

The Court concluded that to deny this fundamental freedom on the basis of a racial classification embodied in the statute in question is directly subversive to the principle of equality at the heart of the Fourteenth Amendment and deprives citizens of liberty without due process of law. Loving, supra, 388 U.S. at 12.

This Court in Loving held that where a statute draws a classification based on race, the state, in the case of legislation, is required to meet the very heavy burden of showing that the distinction made between interracial marriages and other marriages is "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate," and further held that racial classifications are subjected to the "most rigid scrutiny" 388 U.S. at 11.

When a state employs a racial classification, this Court then determines "whether there appears in the relevant materials some overriding [State] purpose" to justify the classification. McLaughlin v. Florida, supra, 379 U.S. at 192. The

classification "must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." Loving v. Virginia, supra, 388 U.S. at 11. Absent such a showing, "the racial classification ... is reduced to an invidious discrimination forbidden by the Equal Protection Clause." McLaughlin v. Florida, supra, 379 U.S. at 192-93.

More recently, in a dissenting opinion in Fullilove v. Klutznick, 448 U.S. 448 (1980), two members of the Court (Justices Stewart and Rehnquist) stated that its decisional history contains one clear lesson:

> Under our Constitution, the government may never act to the detriment

> of a person solely because of that person's race. The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government.... [Id. at 525 (footnote omitted).]

In Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1981), this Court, summarizing many of its decisions, stated that "(a) racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon extraordinary justification." 442 U.S at 272.

Most recently, in Bob Jones University v. United States, ___U.S.___, 76 L.Ed.2d 157, 51 U.S.L.W. 4592 (1983) this Court held that a private school which prohibited interracial dating and marriage

could not qualify as a tax-exempt organization. Citing Loving and McLaughlin, the Court stated that the decisions of the Court "firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination." Bob Jones University, supra, 51 U.S.L.W. at 4602. Therefore it is clear that this Court has long recognized the freedom of a person to marry a person of another race without infringement on that right by the state.

There can be no doubt that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment." Shelly v. Kraemer, 334 U.S. 1, 14 (1948). Therefore, the circuit court judge in

depriving the Petitioner of her child engaged in state action for the purposes of the Fourteenth Amendment. This is further reinforced by holdings of this Court which indicate that a parent has a right to the custody and control of a child. Parham v. J.R., 99 S.Ct. 2493, 2504 (1979); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

D. The trial court relied almost exclusively on Petitioner's interracial marriage in ordering the change of custody.

The decision of the trial court in this case to modify the final judgment of dissolution and award custody to the Respondent relied almost exclusively upon Petitioner's interracial marriage and in so doing, violated Petitioner's right to marry a black man.

It is clear from reading the Order on Modification of Final Judgment which is at issue in this case, that the Petitioner's interracial marriage was the pivotal and determining, if not the sole factor in the court's decision to modify the Final Judgment and grant custody of the minor child to the Respondent.

The court recited the allegations found in the Respondent's Petition for Modification. Specifically, in Paragraph 2 of the Petition for Modification of Final Judgment the Respondent alleged that since the entry of the Final Judgment the Petitioner had not provided the minor child with an environment conducive to the rearing of a child of such tender age, and:

> certainly has not acted in the best interests and welfare of said minor

> child in that she has had a black male living with her for some period of time, and may even still be living with her, a fact that she did not try to conceal from the minor child and, in fact, even permitted the child to be in the same bed with them on different occasions. [J.A. 12] [R.1].[1]

The court noted that it had received a home investigation study made by the same court counselor who made a report in the case of Niles v. Niles, 299 So.2d 162 (Fla. Dist. Ct. App. 1974) which was another case coming out of the Thirteenth Judicial Circuit "involving the social consequences

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[1] The court also recited the Husband's allegations in his Petition for Modification that the child had had head lice on two occasions and clothing stained by mildew but since the court did not make any findings of fact regarding these two allegations or any of the other allegations, these allegations can in no way support the Order modifying the Final Judgment.

of an interracial marriage." [Pet.A. 25] [R.13] The social investigation concluded with the following remarks:

> The wife has chosen for herself and for her child, a life-style unacceptable to the father and to society. No parent has the right to commit a child to the uncertainty of adversity beyond the limit of reasonable, calculable risks. There is no question of parent love for child, nor child love for parent. The child, however, is, or at school age will be, subject to environment not of choice. It is recommended custody of the child be awarded to her father. [R.84]

During the trial the Respondent stated that he did not think the minor child should be subjected to the Petitioner's interracial remarriage. He stated that he "felt" the environment that is caused by a mixed marriage was a strain on the child. However, when asked whether he

had ever had his daughter examined by a psychiatrist or psychologist he stated that he had not and that no professional person had indicated to him that the child was suffering some adverse effect as a result of living within the mixed marriage. [Pet.A. 33] [R. 22-23] In fact, during his entire testimony the Respondent did not utter one word or produce any other evidence of any adverse effect that the child had suffered as a result of Petitioner's marriage to Mr. Palmore.

In the Order on Modification of Final Judgment, the trial court stated that the evidence was that the "mother did have one other male friend at the home on an accasion (sic), and that she shared her bed with Mr. Palmore for a period of time before they married." [Pet.A. 25] The court then repeated the court counselor's

reasoning that the wife had chosen for herself and for her children "a life-style unacceptable to the father of the children and the society in which we live." [Pet.A. 25-26] [R. 13]

The court concluded with the following language:

> The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. This court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vunerable(sic) to peer pressures, suffer from the social stigmatization that is sure to come. [Pet.A. 26-27] [R. 13-14]

When these sentences are read together it becomes clear that the wife's subsequent marriage to a black man was the pivotal, determining, if not the sole factor upon which the trial court relied in ordering the change of custody.

The above-quoted passage clearly focuses on the mere fact of the interracial remarriage and the guess of the trial judge that "social stigmatization" of the child will result. The decision, then, rests on a vague fear or speculation about the future welfare of the minor child and nothing else. Such a judicial determination is not sufficient to meet the compelling interest criteria required in the instant case, and "does not constitute a legitimate overriding purpose independent of invidious racial discrimination which justifies this

classification." Loving v. Virginia, supra, 388 U.S. at 11.[2]

E. The trial court considered the Petitioner's remarriage solely because her new husband was black.

The trial court took into consideration the Petitioner's remarriage solely because her new husband was black. Indeed, the trial court stated in its Order of Modification that both parties had remarried suitable spouses. Neither the trial court nor the record offer the slightest suggestion that the wife's husband is unfit. Instead the trial court observed that

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[2] Strickman, "Marriage, Divorce and the Constitution," 22 B.C.L.Rev.935,997 (1981); "Developments in the Law: The Constitution and the Family," 93 Harv. L. Rev. 1156, 1341-42 (1980).

"there is no issue as to either party's devotion to the child, adequacy of housing facilities or respectibility(sic) of the new spouse...", [Pet.A. 24] [R. 12] It is significant that while both parties had remarried, because the husband married a white woman, the trial court said nothing about the impact of his remarriage upon the child.[3]

Thus, the entire proceedings before the trial court, including the Petition for Modification, the social investigation, the trial and the Order on Modification of

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[3] It is noteworthy that while the Petitioner filed a motion for a social investigation of both parties, the trial judge entered an order for a social investigation of only Petitioner's home. (R-4, 6). This is additional evidence of the tainted process which impermissibly burdened the Petitioner because of the race of her husband.

Final Judgment are permeated with the impermissible consideration of the wife's remarriage to a black man. These considerations infected the entire proceedings. There can be no doubt that the thrust and the effect of these proceedings are to punish the Petitioner for her subsequent interracial remarriage by taking her child away from her. Thus, the decision of the trial court runs afoul of this Court's prohibition in Loving that the right to marry a person of another race resides with the individual and cannot be infringed upon by the state. It is hard to imagine more of an infringement by the state than the taking of a mother's child from her.

There is also no doubt that the parenthetical reference to the Petitioner's living with her husband prior to marrying him is inextricably intertwined with the

racial considerations. Standing alone, this off-hand comment by the judge is of no legal consequence and would not support a change of custody absent a showing of adverse effect on the child.[4]

F. The Fourteenth Amendment prohibits a court from considering or from relying upon a subsequent interracial marriage as a ground for ordering a change of custody.

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[4] Petitioner's relationship with her current husband prior to their marriage, is irrelevant under Florida law absent evidence of adverse effect upon the child. Culpepper v. Culpepper, 408 So.2d 782 (Fla. Dist. Ct. App. 1982). (Wife's sexual relationship irrelevant in change of custody proceedings absent evidence and finding of adverse effect upon child). Here no evidence of adverse effect was offered and no finding of adverse effect was made. See also Dinkel v. Dinkel, 332 So.2d 22 (Fla. 1975) (adultery relevant to initial custody determination only when shown to adversely effect the child). Here no allegation of adultery has ever been made.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This amendment embodies our belief that all men are created equal. The trial court's holding that Melanie would suffer "social stigmatization" because of her mother's interracial marriage, bows to the existence of racism as a fact of American life. In so doing, it judicially institutionalizes and sanctions the blight the Fourteenth Amendment was designed to eradicate. No court which is sworn to uphold the constitutionally protected guarantee of equal protection of the laws can issue such a decision.

The decision below stigmatizes Petitioner's new husband because of his race and burdens the Petitioner solely because

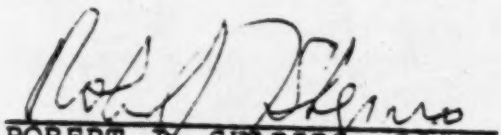
she married him. In short, her interracial marriage has, in effect, disqualified her from being a custodial parent without any justification whatsoever. The decision thus irreconcilably conflicts with the many decisions of this Court interpreting the Equal Protection and Due Process Clauses to prohibit state-sanctioned racial discrimination. In fact, no modern decision of this Court has sustained a racial classification which burdens or stigmatizes black citizens on the basis of race.

The Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution prohibit a court from considering or relying upon a subsequent interracial marriage of the custodial parent as a ground for ordering a change of custody.

CONCLUSION

The Petitioner seeks an order of this Court reversing and remanding this case to the Second District Court of Appeal with instructions to enter a new order setting aside the Order on Modification of Final Judgment of the Circuit Court of the Thirteenth Judicial Circuit dated March 1, 1982, thus restoring the parties to their original status under the Final Judgment of Dissolution entered by the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida on May 29, 1980.

Respectfully submitted,



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